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Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal From the United States District Court for the District of New Jersey

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc., Appellants, present this their statement in support of the jurisdiction of the Supreme Court to review the judgment of the United States District Court for the District of New Jersey in this cause.

OPINION BELOW

The last opinion of the District Court is reported in 143 F. Supp. 689. A copy is appended as Appendix A. Its Findings of Fact and Conclusions of Law are appended as Appendix B. Its earlier opinion remanding the cause to the Interstate Commerce Commission is appended as Appendix C.

JURISDICTION

The suit below was brought by Appellants, under Title 49 U.S.C. Secs. 305(g) and (h) and Title 28 U.S.C. Secs. 1336, 1398, 2284, 2321-2325, and Title 5 U.S.C. Sec. 1009, to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission entered April 18, 1955, granting Tauck Tours, Inc. a license to extend its operations as a broker of motor carrier transportation.

The judgment of the District Court dismissing the complaint was entered August 17, 1956. Notice of Appeal was filed October 11, 1956.

By orders dated December 10, and 17, 1956, the time for docketing the case and filing the Statement of Jurisdiction was extended, first to December 17, 1956 and then to December 31, 1956, due to illness of counsel.

Jurisdiction of the Supreme Court to review the decision of the District Court on direct appeal rests on Title 28 U.S.C. Secs. 1253 and 2101(b).

QUESTIONS PRESENTED

1. The principal question is whether the court below and the Interstate Commerce Commission correctly construed the Interstate Commerce Act:

1.1 To authorize brokers as a class to employ, for the transportation of passengers to whom the broker sells individual tickets, motor carriers whose sole authority over the routes traversed is to provide charter service;

1.2 To authorize motor carriers as a class, under their charter-service authority, to transport passengers who buy individual tickets from brokers;

1.3 To give the Interstate Commerce Commission jurisdiction to issue a brokerage license to an individual applicant, based solely upon a proposal to use charter-service carriers for the transportation of its individually-ticketed passengers.

In the case below, the Interstate Commerce Commission, with the approval of the District Court, holds that the Act may be so construed, provided (a) the passengers travel on the same trip for pleasure,[1] (b) each ticket recites that the broker is the agent, "individually and collectively" of the passenger, (c) the broker makes the contract with the carrier in the name of the passengers instead of its own name, and (d) the broker does not receive a commission from the carrier for the sale of the tickets. On the basis of that construction, a license was granted to the applicant broker.

2. At the time the Commission issued its order in the case below, there were in effect regulations, prescribed by the Commission in a formal rule-making proceeding,[2] which expressly prohibit carriers from

[1] Viz, on a sightseeing or pleasure tour, on a skiing trip, on a trip to attend an athletic, social, religious, educational, musical, or theatrical event, or for a similar purpose.

[2] Regulations—Special or Chartered Party Service (1941), 29 M.C.C. 25.

transporting, under their charter-service authority, any passengers who buy individual tickets or make individual arrangements for their transportation. The second question presented is whether the Interstate Commerce Commission, in a proceeding involving an application for a brokerage license under Section 211 of the Interstate Commerce Act,[3] can lawfully ignore its own regulations and authorize operations which will result in violations of such regulations and the Act as construed in the *Regulations* proceeding, and whether the course of conduct which the Commission has purported to authorize must not be regarded as an exception to its Regulations, and, therefore, a rule-amendment, which is invalid because it was adopted by the Commission without observing the requirements of the Administrative Procedure Act.[4]

3. The third question is whether the following constructions of the statute by the Commission, which were upheld by the District Court, unlawfully apply different and stricter standards to the same term in one instance than another, and are erroneous in law:

(a) Its construction of authorized "charter" service, within the meaning of both Section 207 and Section 208(c) of the Act,[5] to *include* the transportation of passengers who, pursuant to individual arrangements, buy individual tickets for the named types of pleasure travel, when sold by *brokers* receiving no commission for the sale, but to *exclude* that same transportation when sold by *carriers, agents*

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[3] Title 49 U.S.C. Section 311.

[4] Title 5 U.SC.. Secs. 1001 and 1003. Appendix D hereto.

[5] Title 49 U.S.C. Secs. 307 and 308(c). Appendix D hereto.

of carriers, or *brokers accepting commissions from carriers;*

(b) Its construction of the term "broker", within the meaning of Section 203(a)(18),[6] to *include* one who acts exclusively in the capacity of agent of the purchaser of *passenger* transportation, but to *exclude* one who acts exclusively in the capacity of agent of the purchaser of *property* transportation.

4. The final question is whether the decision of the court below misconceived the nature of the legal issues presented to it and, as a result, failed to discharge its duties in reviewing such issues. The principal questions presented to it were legal questions as to whether the Interstate Commerce Commission had erroneously construed the statute and asserted a jurisdiction not embraced within its statutory powers. The decision of the court below indicates clearly that it decided the case upon what it considered to be the equities among the parties, and erroneously failed to determine independently the legal validity of the Commission's statutory interpretation and assertion of jurisdiction.

STATUTORY PROVISIONS INVOLVED

A number of provisions of the Interstate Commerce Act, Title 49 U.S.C., as well as the Administrative Procedure Act, Title 5 U.S.C., are here involved. The text of the principal pertinent provisions involved are set forth in Appendix D hereto. They include the following:

(a) The National Transportation Policy, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, which re-

[6] Title 49 U.S.C. Sec. 303(a)(18). Appendix D hereto.

quires, among other things, that the Interstate Commerce Act be so administered as to foster sound economic conditions in transportation and among the several carriers, and to develop and preserve an adequate national transportation system by highway.

(b) Section 206 (49 U.S.C. Sec. 306), which prohibits motor carrier operations other than pursuant to a certificate of public convenience and necessity;

(c) Section 207(a), which prohibits the issuance of a certificate for passenger operations over other than regular routes, except those authorizing special or charter operations;

(d) Section 208(a), which requires that the certificate specify the service to be rendered pursuant thereto;

(e) Section 208(c), which grants incidental statutory charter authority to each holder of a passenger motor carrier certificate to engage in charter service to any place in the United States;

(f) Section 211(a), which prohibits the sale, procurement, or arrangement for transportation without a broker's license, and prohibits the employment of a carrier not authorized to perform the type of transportation sold, procured, or arranged for;

(g) Section 211(b) which, among other things, authorizes the Commission to issue a brokerage license only where the proposed service will conform to the provisions of the Act, and the Commission's Regulations thereunder, and will be consistent with the public interest and the National Transportation Policy;

(h) Section 203(a)(18), which defines the term "broker";

(i) Section 217(d), which prohibits the transportation of passengers in the absence of published rates, fares, or charges;

(j) Section 2(c), of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1001), which defines the terms "rule" and "rule making";

(k) Section 4 of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1003), which prescribes agency procedures to be followed in rule-making proceedings;

(l) Section 10(e) of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1009), which prescribes, among other things, the duties of the reviewing court below.

STATEMENT OF THE CASE

The controversy in this case is not over facts, but over the law—namely, the statutory class rights *inter sese* of brokers and the several types of motor carriers with respect to the transportation of individually-ticketed passengers.

Tauck Tours, Inc. is engaged in the business of organizing and conducting tours by rail, motor bus, and steamship. Through public advertising, mailing lists, etc., it solicits individual persons to buy tickets for a particular scheduled trip of one of its "all-expense" tours, which includes transportation, hotel accommodations, meals, etc. The price of each patron's transportation is included in the over-all price for the ticket or membership covering his own individual accommodations. Where the transportation is by

railroad or steamship, Tauck purchases an individual carrier ticket for each patron.

In the proceeding below, before the Interstate Commerce Commission (*Tauck Tours, Inc., Extension —New York, N. Y.,* Docket No. MC-29488, Sub 3), Tauck sought a broker's license under Section 211(a) of the Motor Carrier Act,[7] covering a larger area than its present license. Although its passengers would be solicited and ticketed by Tauck individually, just as in the case of the rail or steamship portions of its tours, Tauck's proposal was to use charter-service for their motor bus transportation, instead of the individual-ticket type of transportation used for their travel by rail or water.

The controversy arose over the fact that the carriers employed in the past by Tauck, and which Tauck proposes to employ in the future, do not have authority to transport individually-ticketed passengers, but only charter-service authority, over the routes traversed. Appellants, as intervenors in opposition, took the position that the Act requires that Tauck use precisely the same type of transportation for their travel by bus as it uses for their travel by rail or steamship—that is, individual-ticket service by carriers authorized to transport individually-ticketed passengers over the routes—and that the statute does not permit the tariff rates applicable to individually-ticketed passengers to be defeated through the device of a charter.

In its first report,[8] Division 5 of the Commission

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[7] Title 49 U.S.C. Section 311(a).

[8] Tauck Tours, Inc., Extension—New York, N. Y., (1949) 49 M.C.C. 491.

unanimously held that the principal issue was whether charter-service carriers used by Tauck, which have no authority to transport individually-ticketed passengers over the routes, may nevertheless transport this type of passenger when a broker such as Tauck sells the tickets. It held that if the statute be construed as permitting this to be done, regulation of regular-route passenger transportation would be nullified, because all regular-route carriers have nation-wide charter-service authority under the Act, and each carrier, through arrangements with a broker, would be enabled to transport individually-ticketed passengers everywhere throughout the United States, thereby making a mockery of regulation. It also held that the rights of a charter-service carrier cannot be enlarged, through the broker device, to include the transportation of individually-ticketed passengers, and that, under the Act, particularly Section 211(a),[9] any broker selling individual tickets must use a carrier authorized to carry individually-ticketed passengers over the route, under either a regular-route or special operations certificate. It granted Tauck a license to operate as a broker, provided the proposal of record be changed to comply with those principles.

Thereafter, upon reconsideration, the Division, although adopting and affirming the prior report, modified it to hold that Tauck or any other broker might, as an incident of its status as the holder of a broker's license, lawfully use charter-service carriers for all-expense tours, provided (1) the proposal of record be changed so that each ticket issued by the broker recite that the broker is the individual and collective agent of the passenger for his trans-

[9] 49 U.S.C. Sec. 311(a).

portation, and the broker's contract for the bus be in the name of the passengers, not the broker, (2) the broker not receive a commission from the carrier for the sale of the tickets.[10] Subsequently, upon reconsideration by a majority of the Commission, the two earlier reports were affirmed and adopted, and the authorization of the use of charter service by Tauck and other brokers, as an incident to holding a brokerage license, was extended to include individually-ticketed passengers traveling on the same sightseeing tour, ski trip, trip to attend an athletic, social, religious, educational, musical, or theatrical event, or similar trip.[11]

On judicial review the court below initially vacated the order of the Commission denying further hearing and reconsideration, and remanded the case to the Commission, because it had failed to issue an order implementing its 1952 report.[12] Thereafter, the Commission issued a final report and order reaffirming its prior findings and conclusions and expressly incorporating all of its prior reports.[13] Appellants again sought review in the court below, where the court held that its power to set aside the order was limited, and dismissed the complaint for want of equity.[14]

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[10] Tauck Tours, Inc., Extension—New York, N. Y. (1950), 52 M.C.C. 373.

[11] Tauck Tours, Inc., Extension—New York, N. Y. (1952), 54 M.C.C. 291.

[12] National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc. v. United States of America and the Interstate Commerce Commission, (1954), 122 F. Supp. 876, Appendix C hereto.

[13] Tauck Tours, Inc., Extension—New York, N. Y. (1955), 63 M.C.C. 493.

[14] Appendix A.

QUESTIONS SUBSTANTIAL

The decision upon the questions presented in this appeal will determine whether the regulation of passenger motor carriers by the Interstate Commerce Commission will be largely nullified. It will determine whether some of the largest and most important categories of interstate motorbus passengers will continue to pay individual fares published in tariffs regulated by the Commission, or will be assessed individual fares which are subject only to the unregulated discretion of broker-intermediaries. It will determine whether these passengers will move primarily over irregular routes, in the guise of pseudo-charter service, or over regular routes, as prescribed by the Interstate Commerce Act. It will determine whether selection by a broker will to a large extent supplant the certificate provisions of the Act as a source of *carrier* authority to transport passengers by motor vehicle. To a very great extent, it will determine whether effective regulation and dependable bus service will cease.

The Act expressly grants every carrier with a regular-route certificate, regardless of how short the route may be, a statutory right to provide charter service *to every point and over every route in the United States.*[15] In addition, a large number of carriers hold certificates authorizing charter service over all routes throughout broad multi-state territories. The result is that hundreds of carriers are authorized to provide *charter* service over each certificated route of every regular-route passenger carrier.

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[15] Title 49 U.S.C. Sec. 308(c).

Under the circumstances, the sole protection available to the certificated regular-route carrier, lies in the long-settled statutory interpretations and regulations holding that charter-service authority does *not* include authority to carry individually-ticketed passengers, but only bona fide groups, formed prior to the institution of negotiations for transportation, each of which contracts as a group-entity for the exclusive occupancy of the bus.[16]

When the Commission had before it the specific question whether the incidental statutory right of all regular-route carriers to provide nation-wide charter service could be construed to permit carriers to use that authority for the transportation of individually-ticketed passengers, it squarely held that the statute could *not* be construed to permit *any* such transportation without individual-ticket authority, and prescribed rules prohibiting same, declaring:[17]

> ". . . To permit carriers to deviate from their routes in offering a service to the public whereby the passengers may purchase individual tickets, and where, in many instances, the service would be performed over the route or routes of other carriers by motor vehicle, *would be tantamount to nullification of certificated rights.*" (Emphasis supplied.)

The decision specifically emphasized that the rules *prohibited* charter service to be used for individually-ticketed passengers traveling on "all-expense tours,

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[16] *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401; *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25.

[17] Regulations, Special or Chartered Party Service (1941), 29 M.C.C. 25 at pages 35-36.

historic or sightseeing tours, excursions, and travel to special celebrations and events.'"[18]

The decision here appealed from now construes the same statute to authorize an entire class of expert professional promoters to concentrate upon and *use such transportation* for the exploitation of each of those specifically-named sources of individual-ticket pleasure travel, at individual fares which are not even subject to regulation. On its face, the latter authorization would appear to be more destructive of regulation and service than merely permitting the carriers themselves to do their own promotional work in competition with each other.

Actually, even in the reports incorporated in the final order in this case, the Commission itself has recognized that the intervention of a broker does not reduce the destructive effect:[19]

> **"The question is thus squarely presented, whether these carriers, which lack the authority to conduct in their own names operations of the type here considered (namely the transportation of groups made up of purchasers of individual tickets), may nevertheless conduct such operations merely by reason of the intervention of a broker and the making of a group contract with him. If so, then much of our attempt at regulation in the field of motor passenger carriers must largely be held for naught, at least insofar as concerns the regular-route carriers, which collectively form the backbone of the motor transportation of passengers."**

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[18] Ibid., at pages 44-45.

[19] Tauck Tours, Inc.—Extension—New York, N. Y. (1949), 49 M.C.C. 491, 497.

To illustrate its point, the report continued:

> "For example, consider the case of a large mass-transportation carrier holding a certificate authorizing the transportation of passengers over a regular route between New York City and Jersey City, N. J., and operating several hundred busses, a great many of which are not in use over week ends or on holidays. It may not sell individual tickets in its own name except for travel between points on its authorized route. However, through the medium of a broker utilizing the charter device which applicant would have us approve, such a carrier could operate between New York and any point in the country, over any route, providing individual transportation sold by the broker at his New York City ticket office. The broker could advertise week-end service between such mass-movement points as New York and Atlantic City, N. J., and sell such transportation at any rate he chose, without publishing such rate, and the carrier could provide enough vehicles completely **to demoralize existing New York - Atlantic City regular - route services. Thus the carrier's certificate authorizing operation between New York and Jersey City loses its definitive or limiting character and the protection against unbridled competition, which the act is intended to afford to the existing New York-Atlantic City carriers, becomes a mockery.**" (Emphasis supplied.)

That finding was never reversed, but was *affirmed* by the subsequent reports. The latter, however, like the decision of the court below, construe the statute as authorizing the use of charter service for passengers purchasing individual tickets from brokers, under certain "conditions", all of which, incidentally, were

conceived by the Commission *after* the close of the record in this case.[20]

The *first* of those "conditions" is that the authorization is limited to individually-ticketed passengers traveling on all-expense tours, sightseeing trips, skiing trips, trips to attend athletic, social, educational, religious, musical, or theatrical events, or similar popular sources of individual-ticket travel—the very types of individual-ticket travel that were expressly held, in the *Regulations* case, *supra*, to be *prohibited* for charter-service authority and to require individual-ticket authority.

As the Commission has repeatedly recognized in its decisions, regular-route certificates include authority to transport individually-ticketed passengers traveling on such tours or any other special operations pleasure trips *over the certificated routes*, and regular scheduled service can be provided on a day-in-day-out basis during the unprofitable slack seasons only by virtue of the revenues which these carriers receive from such individual-ticket pleasure travel moving over their certificated routes in both regular scheduled service and special operations service, during the comparatively short peak periods. The first "condition" merely limits the use of charter-service authority to these vital sources of revenue supporting regular, dependable service. It does not lessen the importance or the substantiality of the destructive interpretation in any material degree.

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[20] Although appellants promptly petitioned for further hearing to introduce evidence, among other things, showing that the conditions would not remove the dangers enumerated in the quoted excerpt from the 1949 report, those petitions were denied by the Commission.

The *second* "condition," the effect of which is that the tickets contain a small-print recitation that the broker is the agent of the ticket holder, not only is both false in fact and contrary to the legal effect of the purchase of the ticket, but is found by the Commission to be merely a formality, which changes neither the price paid, the accommodations received, the rights, the liabilities, the attractiveness nor any other circumstance or aspect of the passenger's travel. Even if the citation were read or understood by the passenger, it would not lessen the destructive effect of authorizing raids upon this important source of individual-ticket revenues of the authorized carriers.

The *final* "condition" is that the broker not receive a commission from the charter carrier for the sale of the tickets. Neither Tauck nor any other broker of record has ever received such a commission, even in the absence of this ruling. The large "spread" between the low standard charter rates and the aggregate standard individual fares of a bus load of passengers deprives such a requirement of any protective significance.

This appeal squarely presents the question whether those wholly ineffectual "conditions"—not one of which is mentioned or implied in any section of the statute—actually change the meaning of the statute, and remove the threat to effective regulation, the threat to the preservation of regular dependable bus service, and the frustration of the Congressional intent, all of which the Commission has heretofore consistently recognized to result from the same transaction in the absence of the "conditions."

These are important and vital national questions, deserving even of the time and consideration of the

Supreme Court for their proper determination. Since the very earliest days of regulation, appellants and most of the rest of the industry have been engaged in almost continuous litigation before the Commission in an effort to prevent *any* interpretation of *any* section of the Act which would permit the transportation of individually-ticketed passengers other than pursuant to an individual-ticket certificate issued upon specific proof of public convenience and necessity, including transactions where brokers sell individual tickets and use charter carriers. For the last 15 years, there has been in effect a Commission interpretation of the statute, as well as a specific regulation, which expressly prohibit the transportation, under charter-service authority, of *any* individually-ticketed passengers. For these reasons, most carriers possessing such authority have refrained heretofore from engaging in such transportation, either with or without a broker.

If the interpretation of the Act by the Commission in the case below should become final and effective, however, thereby irretrievably construing the statute to grant every broker in the nation—many of which have nation-wide authority—a class right to utilize the services of carriers without individual-ticket authority in raiding at will the principal peak-season pleasure travel of each certificated carrier, and to vest in virtually *every passenger motor carrier in the nation* the concomitant class right to provide a low-cost means of accomplishing such raids upon the authorized traffic of certificated carriers, a substantial amount of the service provided by the regular-route industry will be destroyed and its regulation in large measure nullified. Deprived of important revenues from traffic moving over its own routes during the *peak*

season, which are necessary to the preservation of its own regular service during the *slack* season, the regular route carrier would be forced to reduce or abandon the latter service, and to seek out a broker with which to exploit the peak-volume pleasure travel of some other carrier, which would, in turn, be forced to do likewise. Regulatory chaos and destruction of the basic *regular* service would closely follow.

The question presented by this appeal is the most vital question, from the standpoint of the regulation of the passenger motor carrier industry and the interests of the public which is dependent thereon, to arise in the 21 years of regulation.

The remaining questions involve (a) the power of the Commission to authorize operations which inherently result in violations of its own Regulations or to create exceptions to its Regulations without complying with the procedural requirements of the Administrative Procedure Act, (b) the legal invalidity of its construction of the term "charter" service and "broker" as used in the statute, and (c) the error of the District Court in deciding the case upon assumed equities among the parties, rather than independently determining the legal validity of the Commission's construction of the statute and assertion of jurisdiction. All are substantial and important questions of law.

ARGUMENT

1. THE COURT BELOW ERRED IN UPHOLDING THE COMMISSION'S CONSTRUCTION OF THE STATUTE AND ASSERTION OF JURISDICTION BASED THEREON.

(a) The Construction Violates the Prohibition of Section 211(a) of the Act

The Commission and the Court below properly hold that Section 211(a) of the Motor Carrier Act,[21] to have any meaning and to serve its purpose of preventing the "invasion of operating rights," must be construed to prohibit a broker from using a carrier not authorized to perform the particular type of transportation sold by the broker.[22] If the carrier "lacks the authority to conduct the operations in its own name," it may not conduct them "merely by reason of the intervention of a broker."[23] Thus, the test, under Section 211(a), of whether the broker may use a particular carrier is whether that carrier can provide the same service in its own name—i.e., when the *carrier* sells the tickets. In accordance with that construction of the meaning of Section 211(a), the decisions hold that the prohibition precludes the use by a broker of a carrier with only charter-service authority over the route, for the "bare" transportation of passengers to whom the broker has sold individual tickets, because such transportation is individual-ticket transportation, which the carrier has no authority to perform.[24]

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[21] Title 49 U.S.C. Sec. 311(a).

[22] 54 M.C.C. 304, 143 F. Suppl. 695; Appendix A, pp. 11a-12a.

[23] 49 M.C.C. 497, specifically made a part of the final order.

[24] 52 M.C.C. 376.

In the construction under attack, however, the decisions hold that such use is *not* prohibited, where the passengers are interested in the same trip for pleasure "and not in mere transportation," even though, as they also hold, the same carrier is not authorized to carry those same passengers in the absence of the intervention of a broker—i.e., where the carrier sells the tickets.[25] On its face, that construction violates the meaning and purpose of Section 211(a).

(b) The Construction Destroys the Statutory Distinction Between Special and Charter Service

The court below erred in holding that the distinction between special and charter service is not an issue in the case at bar.[26] The crucial question under the Commission's own construction of Section 211(a) is whether the transportation sold by the broker comes within the authority of carriers authorized to provide charter service or the authority of carriers authorized to provide special service. The Motor Carrier Act authorizes only two classes of passenger transportation authority, other than regular-route authority, namely, authority to conduct special operations and authority to conduct charter service.[27] These are distinct and separate types of service, and require distinct and separate types of carrier authority.[28] The basic distinction under the statute,

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[25] 52 M.C.C. 376-377.

[26] 143 F. Supp. 695, n. 7; Appendix A, pp. 6a-7a.

[27] Title 49 U.S.C. Sec. 307(a).

[28] *Fordham Bus Corp. Common Carrier Application*, (1941), 29 M.C.C. 293, 297; affirmed *Fordham Bus Corp.* v. *United States* (U.S.D.C.N.Y.), 41 F. Supp. 712; cited in *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401, 406.

as consistently construed by the Commission in its decisions and charter regulations, as well as by the court, is that *special operations* service is any *individual-ticket* service, other than regular scheduled service, while *charter* service is the transportation of a single contractor (including a bona fide pre-formed passenger-group) which, pursuant to arrangements by the contractor as an entity, contracts as an entity for the exclusive use of the vehicle; it does not include the transportation of passengers who purchase individual tickets or make individual arrangements (i.e., negotiate individually) for their transportation.[29]

It should be emphasized that the distinction between the services authorized by special and charter carrier authority does not depend upon whether the transportation is "bare" or not, or whether it is for "pleasure" or not. The sole standard is whether each passenger arranges for or purchases his own transportation individually, or does a single contractor or pre-formed group-entity negotiate and contract for the hire of the entire bus. The same is true of the Regulations governing charter service,[30] which expressly *prohibit*, under the incidental charter-service authority, *all* transportation of the former, and *authorize all* transportation of the latter, regardless of whether the transportation is "bare" or whether it

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[29] *Asbury Park-New York Transit Corp.* v. *Bingler Vacation Tours, Inc.* (1954), 62 M.C.C. 731 at pp. 739-741; affirmed *Bingler Vacation Tours, Inc.* v. *United States and the Interstate Commerce Commission* (D.C.N.J. 1955), 132 F. Supp. 793 and 350 U.S. 921; *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25; *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401, 406, citing *Fordham Bus Corp., supra.*

[30] Regulations, Special or Chartered Party Service (1941), 29 M.C.C. 25.

is for "pleasure."[31] Many bona fide *individual-ticket* operations are *not* "bare" transportation, but are pleasure trips indistinguishable from those here involved, while many common bona fide *charter* operations *are* "bare" transportation and are *not* for pleasure.

As the Commission held in its decision in the leading case relating to the meaning of *special operations* authority, which was affirmed by the Supreme Court, the most common special operations certificates expressly authorize the transportation of passengers on all-expense, sightseeing, or pleasure tours, and the remainder authorize ski trips, race track operations, trips to summer or winter resorts, educational trips, trips to theatrical events or musical events, or some other individual-ticket travel on "group" pleasure trips.[32]

The decisions below apply the same standard as the regulations and the decisions cited above, where the arrangements are made with the carrier or its agent,[33] but apply a different standard—"bare" transportation versus a "trip for pleasure"—where each passenger individually makes his arrangements with and buys his tickets from a broker.[34] This was error. As seen,

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[31] Contrary to the holding in the court below (Appendix A, pp. 7a-8a), the Regulations do not prohibit the *sale of individual tickets* by the carrier, but the *transportation pursuant to the charter authority* of passengers who make individual arrangements or buy individual tickets. 49 M.C.C. 25, 49.

[32] *Asbury Park-New York Transit Corp.* v. *Bingler Vacation Tours, Inc.* (1954), 62 M.C.C. 731, 738-9, affirmed *Bingler Vacation Tours, Inc. v. United States* (U.S.D.C.N.J. 1955), 132 F. Supp. 793, 350 U.S. 921.

[33] e.g. 52 M.C.C. 376-377.

[34] See e.g. Appendix A, pp. 14a-15a.

Section 211(a) requires that the carrier's authority determine whether the broker can use the carrier, and prohibits the determination of the *carrier's authority* by virtue of the broker's use of the carrier. Neither the Act nor the Regulations make any provision for or permit an inference that the type of authority is to vary with the identity of the seller.[35] The Commission cannot lawfully, as it has done here, apply different standards of what constitutes special service, rather than charter service, as between brokers and carriers, the only persons authorized by the Act to sell motor transportation.[36] Special service is special service, and not charter service, regardless of who sells the tickets.

The error of the Commission's construction is highlighted by the fact that the carrier which received "grandfather" *carrier* rights solely as a result of its "pre-grandfather" transportation of passengers traveling on the identical tours here involved — i.e., those of Tauck Tours, Inc. — was granted a *special operations* (i.e., individual-ticket) certificate, rather than a charter-service certificate.[37] If that transportation requires the *grant* of special operations authority, it requires the *possession* of special operations authority. The Commission's interpretation here would either disqualify that carrier to provide the specific transportation for which its certificate was

[35] Cf. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (1956), 350 U.S. 49: "The exemption is concerned with the stage of the processing, not with the person who does it."

[36] *United States* v. *Carolina Freight Carriers Corp.* (1941), 315 U.S. 475, 485-486.

[37] *August Bingler—Common Carrier Application* (1942), 41 M.C.C. 839 (not printed in full).

issued, or destroy the distinction between the two types of authority.

Within the past two years, the Commission has repeatedly confirmed that the transportation of passengers who buy individual tickets from tour brokers comes within the authorities of individual-ticket carriers, and has denied numerous applications for special operations tour certificates — *even those supported by Tauck and other similar brokers*—on the ground that the existing nation-wide tour transportation service, which the certificated *regular-route* carriers lawfully operate over their respective authorized routes at fares published in tariffs on file with the Commission, is extensively used by tour brokers and is adequate to meet the needs of purchasers of individual tickets *from tour brokers*, as well as from the carriers.[38] Those cases likewise confirm the right of the carriers with special operations certificates to carry the patrons of the brokers.

The transportation sold by Tauck and the other brokers to such individually-ticketed pleasure travelers is individual-ticket transportation, and requires either regular-route or special operations authority. It, therefore, cannot be performed under charter service authority, unless the statutory distinction between special operations authority and charter service authority, which this Court and the

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[38] *Riverside Tours, Inc., Extension—Special Operations* (1955), 63 M.C.C. 387; *Rhode Island Bus Company, Extension—Special Operations* (1955), 63 M.C.C. 813 (not printed in full); *Monumental Motor Tours, Inc., Extension—Special Operations* (1955), 64 M.C.C. 814 (not printed in full); *The McMahon Transport Co.—Extension—Special Operations* (1952), 54 M.C.C. 813 (not printed in full).

Commission have heretofore held to exist,[39] is to be destroyed.

(c) The Commission's Construction Defeats the Congressional Intent and Effective Regulation

Under settled law, the Congressional intent must control the construction to be given the statute.[40] The Commission's construction, which the Court below upholds, would substantially thwart the intent of Congress:

> (a) That motor transportation (other than incidental charter service) be provided only pursuant to certificates and only after proof of public convenience and necessity for the specific service operated[41] and that the principal traffic move pursuant to regular-route authority,[42]—by creating a statutory class right to operate everywhere upon selection by a broker;
>
> (b) That charter service be merely *incidental,* —as evidenced by the statutory grant of appurtenant charter-service authority to all points in the nation to every holder of a regular-route certificate, regardless of how short the route might be,[43]—by construing that incidental right to include the right to carry the principal interstate traffic supporting year-round regular-

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[39] *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401, 406.

[40] *United States* v. *American Trucking Associations, Inc.* (1940), 310 U.S. 534; *United States* v. *Rosenblum Truck Lines* (1942), 315 U.S. 50; *Gulf State Steel Company* v. *United States* (1932), 287 U.S. 32.

[41] Title 49 U.S.C. Sections 306 and 307.

[42] Title 49 U.S.C. Section 307(a).

[43] Ibid, Sec. 308(c).

route service—i.e., pleasure travel moving under individual tickets;

(c) That all individual fares paid by passengers be published in tariffs on file with and subject to regulation by the Interstate Commerce Commission,[44]—by construing the statute to permit these passengers to pay individual fares *fixed by brokers,* which fares are not even subject to regulation; and

(d) That a carrier's authority not be enlarged as a result of the intervention of a broker,[45]—by construing the statute to permit charter-service carriers to transport broker-originated pleasure travelers which they could not transport in the absence of a broker.

Moreover, in the National Transportation Policy,[46] Congress declares its intent to be that all sections of the Interstate Commerce Act be construed in such a manner as to foster and preserve a sound and economically stable passenger transportation industry, of which, as the Commission itself holds in the present case below,[47] the regular-route industry is the backbone. The effect of the Commission's construction of the statute is to authorize all of the hundreds of carriers possessing charter-service authority to compete for the principal individual-ticket pleasure-travel traffic of each certificated regular-route carrier, whenever any one of the many professional promoter-brokers determines that it would be profitable for him to exploit that traffic by promoting individual-

[44] Title 49 U.S.C. Sec. 317.

[45] Title 49 U.S.C. Sec. 311(a).

[46] Title 49 U.S.C. preceding Sections 1, 301, and 401.

[47] Title 49 U.S.C. 491, at p. 497.

ticket tours or other pleasure trips, under a course of business whereby the broker charges each passenger an unpublished individual fare in competition with the published fare of the regular-route carrier, and pays the otherwise unauthorized carrier the lower rates applicable to charter service. Such a construction cannot fail to substantially frustrate and defeat that intent.

The opinion of the court below dismisses these aspects of the Congressional intent as "abstract" because of Tauck's "valid business reasons" for wanting the statute to be so construed, and suggest that the exercise by others of the class right here in issue might be prohibited, if their "ends" were illegitimate.[48] "Reasons" and "ends" have nothing to do with whether that class right exists. If it is a statutory incident of Tauck's license, it is an incident of all licenses.

Contrary to the opinion below, there need be no express prohibition singling out such use by "tour brokers" *separate* from that for "brokers" generally. The issue is whether, by its general *class* prohibitions, the Act forbids *all* such use by *all* brokers, and whether the Commission erred in reading into those prohibitions *exceptions* which are neither mentioned nor implied therein.

The court's assumption that service of tour brokers is in jeopardy is without any supporting evidence of record in this proceeding. The sole effect upon the brokers of a reversal of the Commission's construction would be to require brokers to (a) use carriers authorized to transport individually-ticketed

[48] 143 F. Supp. at p. 696; Appendix A, p. 13a.

passengers and (b) pay the published individual-ticket fares of such carriers (less a commission), instead of paying the lower charter rate.[49] Neither the adequacy of the authorized existing transportation service nor the reasonableness of existing fares is a proper issue in determining the right of brokers to use a different type of carrier service. Other provisions of the Act[50] provide proper remedies for any deficiency which might exist therein. It is most significant, moreover, that in the cases where the issue *was* properly involved, Tauck's pre-regulation carrier received *special operations* (individual-ticket) authority—*not* charter service authority—by virtue of its operations for Tauck[51]—and the existing individual-ticket services for tour-passengers—including specifically the patrons of Tauck and the other brokers—were found to be substantially patronized and to be adequate to meet the needs of the passengers and the brokers.[52]

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[49] Cf. *Acme Fast Freight, Inc., Common Carrier Application* (1938), 8 M.C.C. 211 and (1939), 17 M.C.C. 549, where same Act was construed to forbid freight forwarders from continuing their past practices with respect to (a) the use of contract carriers and (b) the type of rates paid to common carriers. The Supreme Court upheld the Commission's rulings in both respects. *Acme Fast Freight, Inc.* v. *United States* (1940), 309 U.S. 638, *United States* v. *Chicago Heights Trucking Co.* (1940), 310 U.S. 344.

[50] Title 49 U.S.C. Secs. 307, 317.

[51] *August Bingler, Common Carrier Application* (1942), 41 M.C.C. 839 (not printed in full).

[52] *Riverside Tours, Inc., Extension—Special Operations* (1955), 63 M.C.C. 387; *Rhode Island Bus Company, Extension—Special Operations* (1955), 63 M.C.C. 813 (not printed in full); *The McMahon Transport Co., Extension—Special Operations* (1952), 54 M.C.C. 813 (not printed in full); *Monumental Motor Tours, Inc., Extension—Special Operations* (1955), 64 M.C.C. 814 (not printed in full).

For the foregoing reasons, the Commission's construction of the statute is erroneous as a matter of law.

(d) The Commission Cannot Lawfully Issue a License Based Upon an Unlawful Proposal

The jurisdiction of the Commission to grant brokerage licenses is restricted to proposals which, among other requirements, "conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder," and are "consistent with the national transportation policy."[53] Since the proposal to use charter-service carriers for the transportation of individually-ticketed passengers is unlawful, and does not qualify under those limitations, the Commission had no jurisdiction to issue the license.

2. THE COURT BELOW ERRED IN UPHOLDING THE COMMISSION'S AUTHORIZATION OF OPERATIONS WHICH WILL NECESSARILY RESULT IN VIOLATIONS OF ITS REGULATIONS AND IN AMENDMENT OF THOSE REGULATIONS WITHOUT COMPLIANCE WITH PRESCRIBED RULE-MAKING PROCEDURES.

In a formal rule-making proceeding, conducted pursuant to the statute, the Commission prescribed regulations, which are still in effect, governing the conduct of charter service pursuant to the incidental right granted by Section 208(c) of the Act.[54] Those rules and the accompanying explanation by the Commission restrict such operations to the transportation of pre-organized groups, prohibit the transportation under that right of *any* passengers buying individual tickets or making individual arrangements for their transportation, and hold that appropriate special operations or regular-route authority is necessary for

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[53] Title 49 U.S.C. Sec. 311(b).

[54] *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25.

such transportation. The report therein goes out of its way to list specifically by name, travel pursuant to individual tickets, on all-expense tours, sightseeing tours, trips to athletic or other special events, and other similar pleasure trips, as included within the prohibition.

The Commission in the case below holds that where passengers buy individual tickets or make individual arrangements with a broker, the broker may use carriers operating pursuant to that same charter service authority, provided the transportation involves those same types of pleasure travel, and provided further that the ticket recites that the broker is the agent of the passenger. If the latter authorization is not meaningless and futile, it necessarily and implicitly contemplates that the carrier may transport such individually-ticketed passengers pursuant to charter-service authority — a course of conduct expressly prohibited by the Regulations. It therefore violates

> ". . . the settled rule that a valid administrative regulation binds the administrator himself equally with others, United States ex rel. Accardi v. Shaughnessy, supra, 347 U.S. 260, 74 S. Ct. 499 (98 L. Ed. 681); Chapman v. Sheridan-Wyoming Co., 1950, 338 U.S. 621, 629, 70 S. Ct. 392, 94 L. Ed. 393; Bridges v. Wixon, 1945, 326 U.S. 135, 153, 65 S. Ct. 1443, 89 L. Ed. 2103; See Jefferies v. Olesen, D.C.S.D. Cal. 1954, 121 F. Supp. 463, 476, the same as though the provisions of the regulation were prescribed in terms by the statute. Atchison, T. & S. F. Ry. Co. v. Scarlett, 1937, 300 U.S. 471, 474, 57 S. Ct. 541, 81 L. Ed. 748. United States v. Finn, D.C.S.D. Cal., 127 F. Supp. 158, 165."[55]

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[55] *School District 2 Fractional* v. *United States* (U.S.C.A., 6th Circuit 1956), 229 F. 2d 681, 686.

By the same token, the Commission's decision creates exceptions to the unrestricted direct prohibition specified in the Regulations, the effect of which is to curtail and revoke partially that prohibition, and to change entirely the criterion of charter service from that specified in the Regulations. Such substantial amendments of the Regulations constitute "rule-making," as defined in the Administrative Procedure Act.[56] Inasmuch as the Commission made no attempt to comply with the procedures prescribed by that Act,[57] the order is invalid.

3. THE COURT BELOW ERRED IN FAILING TO FIND THAT THE COMMISSION'S INTERPRETATIONS OF THE ACT ARE ERRONEOUS.

The order of the Commission as well as that of the court below, rests upon a ruling that individually-ticketed passengers who travel together and are interested in a tour for pleasure, rather than mere transportation, form a sufficiently cohesive group to qualify for lawful charter service, within the meaning of Section 207 and 208(c) of the Act,[58] where a broker sells the individual tickets. The decisions also hold, however, that the identical individually-ticketed passengers would not be a sufficiently cohesive group to qualify for lawful charter service, within the meaning of those same sections, if a carrier, an agent of a carrier, or a broker receiving a commission from a carrier sells the same tickets. There is no statutory warrant for thus applying a different or stricter test of lawful charter service for carriers than for brokers,

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[56] Title 5 U.S.C. Sec. 1001, see Appendix D, p. 34a.

[57] Ibid, Sec. 1003, Appendix D, pp. 34a-35a.

[58] Title 49 U.S.C. 307 and 308(c).

and the latter construction is erroneous as a matter of law.[59] Moreover, in thus ascribing to the same statutory language two directly contrary meanings, the Commission's interpretation and the order based thereon are not only erroneous, but mutually self-refuting, arbitrary and capricious.

The definition of the term "broker" in Section 203(a)(18) embraces not only brokers of passenger transportation but also brokers of property transportation. The Commission's conclusion in the case below rests upon a ruling that, as a matter of law, the broker retains his status as a broker, within the meaning of that section, even though he represents exclusively the purchaser of the transportation. The Commission and the courts have consistently held that one who represents exclusively the purchaser of *property* transportation does *not* retain the status of a broker within the meaning of that Section.[60] The same statutory provision cannot be given two such diametrically opposite interpretations, based upon the application of different and conflicting standards. The Commission's interpretations of this section are erroneous, self-refuting, arbitrary and capricious.

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[59] *United States* v. *Carolina Freight Carriers Corp.* (1941), 315 U.S. 475, 485-486.

[60] *Interstate Commerce Commission* v. *Chicago Food Manufacturers Pool Car Group, et al*, U.S.D.C.N.D. Ill. (1941), 39 F. Supp. 283; *Nevins Distributors, Inc., Broker Application* (1950), 51 M.C.C. 383; *Copex Company, Inc.* (1939), 14 M.C.C. 689; *Faulk Broker Application* (1938), 10 M.C.C. 145; *National Federation of Textiles, Broker Application* (1938), 10 M.C.C. 407.

4. THE COURT BELOW ERRED IN MISCONSTRUING AND FAILING TO DISCHARGE ITS DUTIES AS A REVIEWING COURT ON THE TYPE OF ISSUES PRESENTED TO IT.

The principal questions presented to the Court below were legal questions as to whether the Commission had erroneously construed the statute and asserted a jurisdiction not embraced within its statutory powers.

Under Section 10(e) of the Administrative Procedure Act,[61] the reviewing court has an affirmative duty to decide independently all relevant questions of law, interpret relevant statutory provisions, hold unlawful and set aside any agency findings or conclusions which are arbitrary, capricious, or otherwise not in accordance with law or which are in excess of the agency's statutory jurisdiction or authority, and any agency action which was without observance of the procedure required by law.

The opinion of the Court below shows that such independent determination was not made. At the very outset of its discussion of the crucial question, it ruled that its powers as a reviewing court are so limited that it may not overrule the Commission merely because the Court might reach a different conclusion, and thereafter confines its discussion primarily to considerations relating to assumed equities among the parties—such as the applicant's "reasons" for wanting to continue the questioned practice, its right to "complain with justice" at its disruption, and the wholly erroneous assumption that the practice had not been challenged earlier—disregarding completely the all-inclusive general prohibition in the statutory

[61] Title 5 U.S.C. Sec. 1009, text quoted in Appendix 35a-36a.

language and the Congressional intent.[62] In thus restricting its exercise of its powers of review, serious error is committed in the decision. On issues of statutory interpretation and Commission jurisdiction, such as here presented, it was the duty of the Court to determine independently whether it would actually reach the same conclusion as the Commission with respect thereto, and if, after such independent determination, it reached a contrary construction of the statute and the Commission's jurisdiction, to overrule the Commission. As the Supreme Court declared during the past year, in connection with a somewhat similar statutory interpretation by the Interstate Commerce Commission:[63]

> ". . . Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. See *Social Security Board* v. *Nierotko,* 327 U.S. 358."

In the *Nierotko* case, the Supreme Court, citing a long line of authorities, declared:[64]

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

The construction and interpretation of a statute is a judicial function, and if, upon independent determination, administrative interpretation and judicial construction conflict, the latter must prevail.[65] Although

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[62] Appendix A, pp. 13a-14a.

[63] *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (1956), 351 U.S. 49.

[64] 327 U.S. 358 at p. 369.

[65] *Burnette* v. *Chicago Portrait Co.* (1931), 285 U.S. 1; *Woods* v. *Benson Hotel Corporation* (1949, ce8th), 177 F. 2d 543.

great weight ordinarily attaches to a construction consistently given by the administrative agency concerned with its administration, that weight cannot be given where, as here, constructions under attack have not been consistent and uniform, but are in direct conflict with its past constructions of the same statutory provisions, as well as the clear meaning of the statutory language itself.[66] In such instances, the cases cited hold that the administrative interpretation may be taken into account by the court only to the extent that it is supported by valid reason. And where, as here, the construction under attack is, on its face, so nearly identical with constructions which the Commission itself holds to nullify regulation, the administrative interpretation must be independently scrutinized with particular care to make certain that the same result will not occur.

In failing to make that independent determination, and in confining its consideration of the crucial statutory question largely to assumed equities among the parties, the Court below failed to discharge the duties of a reviewing court.

CONCLUSION

For the reasons set forth above, the questions presented by this appeal, which involve the determination of the rights, as a class, of all brokers of passenger motor transportation and all carriers of passenger motor transportation, and which involve statutory interpretations similar in every essential respect to interpretations which the Commission itself has held

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[66] *United States* v. *Missouri Pacific Railroad Company* (1928), 278 U.S. 269; *Burnette* v. *Chicago Portrait Co.* (1931), 285 U.S. 1.

to threaten the provision of motor bus service and the nullification of regulation, are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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Dated: December 28, 1956

Proof of Service

I, Eugene T. Liipfert, attorney for National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc., appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 28th day of December, 1956, I served copies of the foregoing Statement as to Jurisdiction on the several parties, as follows:

On the United States, by mailing a copy with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission by leaving a copy thereof at the offices of Robert W. Ginnane, Esquire, its General Counsel, and Isaac K. Hay, Esquire, Assistant General Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

On Tauck Tours, Inc., intervening defendant, by mailing a copy in duly addressed envelope with postage prepaid to Francis V. Goggins, Esquire, 60 East 42nd Street, New York, New York;

On American Society of Travel Agents, intervening defendant, by mailing a copy thereof in duly addressed envelope with postage prepaid to Jerrold Scoutt, Jr., Esquire, 777 14th Street, N. W., Washington 5, D. C.;

On Thomas Cook & Son, Inc., Parker Tours, Inc., et al, intervening defendants by mailing copies thereof in duly addressed envelope with postage prepaid to S. Harrison Kahn, Esquire, Investment Building, 1511 K Street, N. W., Washington 5, D. C.

Eugene T. Liipfert
Attorney for National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc.